Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-777

CLEVELAND BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

JO CAROL LA FLEUR, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

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CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported in 465 F. 2d 1184 (6th Cir., 1972). That Court's order denying rehearing is not reported. The opinion of the District Court is reported in 326 F. Supp. 1208 (N. D. Ohio, 1971). The opinions of the District Court and the Court of Appeals, and the order denying rehearing are reproduced in the Appendix filed in this Court, June 21, 1973.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was rendered and filed on July 27,

1972. A motion for a rehearing and suggestion for a hearing *en banc* was denied on August 29, 1972. The Petition for a Writ of Certiorari was filed November 27, 1972, and granted April 23, 1973. The jurisdiction of this Court was invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in U. S. CONST. amend. XIV. § 1: ". . . . ; nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED FOR REVIEW

I

Does a regulation of the Cleveland Board of Education requiring a pregnant teacher to take at least an eight month leave of absence from her job, without pay, and regardless of her ability and desire to continue working, violate the Equal Protection Clause of the Fourteenth Amendment?

Respondents contend that the regulation is unconstitutional and that the judgment of the Court of Appeals so holding should be affirmed.

II

Is a classification including employed women who require time away from work for a temporary disability relating to childbirth, but excluding employees with other temporary disabilities, subject to strict judicial scrutiny?

Respondents contend that a classification based on sex is subject to strict judicial scrutiny, although its

arbitrary nature would also render it unconstitutional under the more lenient standard of review.

STATEMENT OF THE CASE

A. APPLICATION OF THE REGULATION

At the time of the filing of their complaints, Mrs. LaFleur and Mrs. Nelson had both been forced to leave their teaching positions in the Cleveland Public Schools pursuant to the mandatory maternity rule of the Cleveland Board of Education.[1] Mrs. LaFleur was placed involuntarily on a maternity leave of absence on March 12,

[1] The regulation provides:

"Any married teacher who becomes pregnant and who desires to return to the employ of the Board at a future date may be granted a maternity leave of absence without pay.

"APPLICATION. A maternity leave of absence shall be effective not less than *five (5) months before the expected date* of the normal birth of the child. Application for such leave shall be forwarded to the Superintendent at least *two (2) weeks before the effective date of the leave of absence.* A leave of absence without pay shall be granted by the Superintendent for a period not to exceed *two (2) years.*

"REASSIGNMENT. A teacher may return to service from maternity leave not earlier than the *beginning of the* regular school semester which follows the child's age of *three (3) months.* In unusual circumstances, exceptions to this requirement may be made by the Superintendent with the approval of the Board. *Written* request for return to service from maternity leave must reach the Superintendent at least six (6) weeks prior to the beginning of the semester when the teacher expects to resume teaching and shall be accompanied by a doctor's certificate stating the health and physical condition of the teacher. The Superintendent may require an additional physical examination.

"When a teacher qualifies to return from maternity leave, she shall have priority in reassignment to a vacancy for which she is qualified, under her certificate, but she shall not have prior claim to the exact position she held before the leave of absence became effective.

"*A teacher's failure to follow the above rules for maternity leave of absence shall be construed as termination of contract or as grounds for dismissal.*" (Emphasis in original) (A. 39-40).

1971 (A. 41). Mrs. Nelson was terminated on March 26, 1971 (A. 42). The departure time selected by Petitioners for each teacher, in accordance with the mandatory maternity leave rule, was the date five months prior to the expected date of childbirth (A. 40, 42). Both teachers filed complaints asserting jurisdiction of the United States District Court under the Civil Rights Act of 1871, 42 U. S. C. § 1983, and 28 U. S. C. § 1343 (3) and (4), and their two cases were consolidated for hearing by the District Court.

Shortly prior to hearing, the Board of Education conceded that Mrs. Nelson would be placed on maternity leave. However, Petitioners continued to maintain that since her teaching contract would expire at the end of the 1971 academic year under the Board of Education's maternity leave policy, Mrs. Nelson would have no right to re-employment in the Cleveland Public Schools.

B. THE EVIDENCE PRESENTED ESTABLISHES NO MEDICAL PURPOSE FOR PETITIONER'S MANDATORY MATERNITY RULE

1. The Origins of the Mandatory Maternity Leave Rule Were Non-Medical in Nature

The mandatory maternity rule of the Cleveland Board of Education was promulgated at the instance of Dr. Mark C. Schinnerer, Superintendent of Schools both before and after the mandatory maternity rule was adopted. Dr. Schinnerer testified that prior to the early 1950's there had been no regulation with respect to maternity leave; while leave would be granted, it was not imposed (A. 172, 179). Although it was at Dr. Schinnerer's recommendation that a mandatory rule was adopted, at no time in his testimony did Dr. Schinnerer suggest that any medical purpose was served by its adoption. The problem apparently was that

doctors could not always be counted on to require their patients to stop teaching on the basis of their pregnancy alone (A. 181). Selection of the specific cut-off date prior to childbirth appears to have been chosen primarily for the sake of appearances. Dr. Schinnerer testified as to the basis of the required termination date: "Well, it was about a half way point and it was at that point when the physical appearance begins to change." (A. 176). Requiring a teacher to leave work once she "began to show" was also in keeping with Dr. Schinnerer's testimony that the rule had been adopted to save teachers the embarrassment of children giggling at their pregnant condition (A. 173).

That portion of the maternity rule relating to a preferential re-employment right after childbirth originally permitted a teacher to return from maternity leave only at the beginning of a semester following the age of six months of the child (A. 172). Again, the reason for prohibiting a teacher from returning to work soon after the birth of her child was based on non-medical considerations. Dr. Schinnerer testified that he had had a twofold reason for the return provision for restricting the time of return:

> "One was so that it wouldn't be a second break. A second class wouldn't have the disruption of changing teachers in the middle of the semester. And the other was that I am a strong believer that young children ought to have the mother there. I think much of the difficulties we have in this country come from the fact that parents have neglected, and it is very important that they be there for the love and tender care of the babies. If that is a lecture . . . ." (A. 184).

No additional testimony was offered by any of Petitioners' witnesses to justify restricting a teacher's right to an early return to work after childbirth.

2. Both Parties' Expert Witnesses Agree that Pregnancy Requires Individualized Treatment and that No Medical Rule Requires All Women to Leave Work Prior to Childbirth

Three witnesses presented medical testimony in this case. Respondents called Dr. Sarah Marcus, President of Women's General Hospital in Cleveland and the Chief of its Department of Obstetrics and Gynecology, an obstetrician still delivering babies after forty-eight years of practice (A. 145, 162-163) and herself a mother (A. 148, 151-152). Dr. Verners Rutenbeigs, Mrs. Nelson's obstetrician also testified on behalf of the Respondents. Petitioners relied on Dr. William C. Weir, a physician who, since 1948, has been specializing in problems of infertility (A. 106-108).

These three medical experts were in general agreement that the effects of pregnancy, like other temporary medical disabilities, are individual in nature and should be treated as such. Dr. Marcus stressed the need for individualized treatment (A. 148). Dr. Weir agreed with respect to the individual nature of each pregnancy and the requirement of individualized prescription (A. 124).

There was no real dispute among the medical experts with respect to the usual characteristics of a normal pregnancy, nor with respect to possible complications of pregnancy. Headaches and nausea, including vomiting, were recognized as characteristic of the first three months of some normal pregnancies while spontaneous abortion was mentioned as a possible complication of this period of pregnancy (A. 95, 110, 152). The maternity rule of the Cleveland Board of Education permits pregnant teachers to carry on their regular teaching duties during this period of pregnancy.

No expert witness suggested that any characteristic of a normal pregnancy would impair a woman's ability to work during the third, fourth, or fifth month of her pregnancy. The Board of Education, however, does not allow its teachers to work past the end of the fourth month of pregnancy. Potential complications of this period of pregnancy were described by Petitioners' witnesses as prematurity, early forms of toxemia, and placenta previa (A. 111-112). Despite stressing the possible complications of pregnancy, Petitioners' expert testified that "the middle trimester is considered by far the safest time." This trimester was specifically described as being "12 weeks to 28 weeks of gestation" (A. 123); this "safest time" thus extends well beyond the teacher termination date required by the Board of Education's mandatory maternity rule.

All three experts testified that the last three months of a normal pregnancy are characterized by weight gain (A. 96, 113, 158). Petitioners' witness also claimed that other characteristics such as a shift in the center of gravity and an increase in appetite and in the frequency of urination (A. 113, 114) are prevalent during this period of pregnancy. Respondents' witness, Dr. Marcus, testified that her pregnant patients had never complained of any change of their centers of gravity (since, if there were such changes, they would adjust to them gradually), and that, absent a bladder infection, frequency of urination has never caused her pregnant patients any difficulties (A. 158-159). Respondents' witness, Dr. Rutenbeigs, denied that an increase in appetite is a necessary concomitant of this stage of pregnancy, testifying merely that different kinds of food than usual may be desired (A. 97). Petitioners' witness again described placenta previa, toxemia and premature labor as the possible complications of this period of pregnancy.

The medical experts also testified to the incidence of the possible complications of pregnancy, their foreseeability and care. Petitioners' witness testified that ten percent of all women are subject to toxemia (A. 111).[2] The experts agreed that toxemia occurs slowly and can be foreseen to a certain extent (A. 103, 111) even though, as Petitioners' expert testified, the causes of toxemia are unknown (A. 124). A patient with toxemia may be required simply to stay at home, or, bed rest, hospitalization, or termination of pregnancy may be prescribed (A. 104, 111, 153). Placenta previa occurs in less than one-half of one percent of pregnancies, according to Respondents' witness, Dr. Rutenbeigs (A.102), and in one percent to two percent of all pregnancies according to Petitioners' witness, Dr. Weir (A. 112). Dr. Weir also testified that placenta previa can be treated but not prevented (A.125).

The experts all agreed that, despite the possibility of complications, medical consensus does not require all pregnant women to stop work prior to childbirth. Dr. Rutenbeigs testified that, in his opinion, women can continue working during pregnancy (A. 93) and that he had advised Mrs. Nelson that she "could teach as long as she felt motivated to do so" (A. 91). In Dr. Marcus' opinion, some teachers can teach right up until childbirth. Indeed, she had worked during her own pregnancies virtually until the time of delivery (A. 148-149, 151). Dr. Jane Kessler, a child psychologist, testified that she had worked until two weeks before childbirth (A. 136-137), and Dr. Weir, Petitioners' expert, testified on cross-examination

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[2] Although Petitioners claim that their own summation of published medical information demonstrates that Dr. Weir's testimony represents the consensus of medical expertise (Pet. Br. 8, n.2), Exhibit A to Petitioners' brief contends only that six to seven percent of pregnant women are subject to toxemia (Pet. Br. 41).

that he "generally allowed his patients to lead a relatively normal life"; so long as a pregnancy was normal his patients were permitted to make their own determinations within reason (A. 121).

Dr. Weir, Petitioners' own witness, further stated that:

> "I have had patients that worked as secretaries throughout pregnancy, and I have seen nurses that worked in the hospital going to term and practically going from the nurse's station up to the delivery room" (A. 128).

The experts agreed not only that women may often work right up until the date of delivery, but also that normal physical activity can be carried on throughout pregnancy. Dr. Marcus testified that she advocates physical activity during pregnancy (so long as the pregnancy is normal, that is, without complication) and that climbing stairs or even farm labor is not harmful (A. 149, 156). Dr. Weir permits his pregnant patients to swim and to engage in reasonable physical activities (A. 121).

The only concern voiced by the experts with respect to physical activities was sudden, violent, physical exertion which could contribute to a premature separation of the placenta (A. 115, 159-160). Petitioners' expert admitted that a premature separation of the placenta could occur in a woman who is home caring for her children while pregnant, or could occur spontaneously (A. 125). Dr. Marcus noted that great physical exertion may be required of a nurse, such as lifting a patient who has fallen out of bed. The evidence of one of Petitioners' witnesses indicates that the only physical activity required of teachers in the course of their regular duties is that of standing (A. 212). Dr. Marcus testified that her hospital had no across-the-board rule requiring its nurses to

stop work at any specific time prior to childbirth and that she imagined that the hazards of the nursing profession were greater for a pregnant woman than those of teaching (A. 150-151).

Both Mrs. LaFleur and Mrs. Nelson testified to their continued ability to carry out their teaching duties during pregnancy (A. 48-50, 72-73). Mrs. Nelson testified that she had had no more disciplinary problems than normal as a teacher and that discipline became much easier during her pregnancy (A. 46-47). Mrs. LaFleur testified that she had had no disciplinary problems with her students (A. 66, 71), and indeed, had assisted a non-pregnant teacher with some of hers (A. 67, 77-78).

Petitioners' witnesses offered testimony relating to duties of a school teacher and the general environment of the public schools today. Petitioners sought to demonstrate that the situation in the schools was such that teachers must be fearful of their students and that their concerns relating to their environment would have an adverse consequence on their health.

The number of assaults on teachers, the number of accidents sustained by teachers, and the number of guns and knives confiscated from students in schools was introduced into evidence by one of Petitioners' witnesses over Respondents' objections (A. 192-193, 195) but this witness did not know whether the teachers assaulted were pregnant or not, nor did he know whether any teachers sustaining falls were pregnant (A. 202-203). Indeed, Petitioners at no time have claimed that any pregnant teacher has ever been injured or assaulted during the course of her duties while employed by the Cleveland Board of Education.

Petitioners' witness, Dr. Weir, testified that while women undergoing normal pregnancies are frequently

subject to worries (A. 114), there is no evidence yet to establish that worries can induce premature labor (A. 114-115), nor is it clear that the mental health of the mother can have an effect on her pregnancy. (A. 125-126). Although Petitioners' medical doctor, who was not qualified as a psychological expert, testified to the psychological effects of pregnancy upon women, Respondents' witness, Dr. Jane Kessler, a child psychologist and Director of the Mental Development Clinic of Case-Western Reserve University, was not permitted to testify to the psychological effects upon school children of being taught by a pregnant teacher (A. 135-136).

Petitioners, indeed, did not dispute Respondents' evidence that, whatever the environment of the Cleveland Schools, the Board of Education today allows pregnant students to remain in school throughout their pregnancies.[3] Nor did Petitioners deny that the Board of Education will permit a teacher in an advanced stage of pregnancy to teach in its schools on a "volunteer"—i.e., unpaid—basis, after she has been required to leave her teaching position pursuant to the mandatory maternity rule.[4]

3. The Petitioners Do Not Contend that the Specific Provisions of their Present Mandatory Maternity Rules Are Medically Required

While Petitioners' witness, Dr. Weir, generally considered the mandatory maternity rule to be reasonable (A.

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[3] One of the school teachers testifying indicated that there had been pregnant school girls enrolled in the school in which she taught (A. 87), while one of the Respondents had taught seventh, eighth and ninth graders who were pregnant (A. 67).

[4] See testimony of Kathryn Tucker, a teacher who taught in a Cleveland Public School on a volunteer basis from the end of her fifth month of pregnancy through her eighth month of pregnancy (A. 81-88).

118) on the basis of "the chance of injury and the increased worries" (A. 119), he admitted that "the exact time of four months, of course, is a little flexible" (A. 119). Attorneys for the Petitioners are even more specific. They state: "Whether the mandatory maternity leave should begin at the beginning of the fifth, or the sixth, or the seventh month of pregnancy is medically debatable" (Pet. Br. 20).

The Petitioners offered no evidence of any medical reason for that aspect of the maternity rule restricting a teacher's right to return to work.

C. THE EVIDENCE PRESENTED ESTABLISHES THAT NO EDUCATIONAL PURPOSE IS SERVED BY THE MANDATORY MATERNITY RULE

1. Far From Being Disruptive of the Classroom Environment, the Evidence Presented Establishes that a Teacher's Pregnancy May Be Conducive to Increased Rapport Between Teacher and Pupil

Both Mrs. LaFleur and Mrs. Tucker testified that they told their students of their pregnancies (A. 70-71, 86). Neither Mrs. LaFleur nor Mrs. Tucker experienced any giggling or snide remarks from students (A. 71, 86). Indeed, Mrs. LaFleur's students applauded when they heard the news (A. 70), and Mrs. LaFleur testified that her pregnancy brought her closer to the students: she talked with them about her pregnancy; some students told her that her study hall students planned to have a shower for her, and one of her students who had had a baby offered to bring her her maternity clothes (A. 70-72). Mrs. Tucker also testified to the favorable reactions of her students to her pregnancy (A. 86).

Only Dr. Schinnerer testified that pregnancy was dis-

ruptive of classroom order. Dr. Schinnerer, now 74 years old, retired from his position with the Cleveland Board of Education in 1961 (A. 167, 169). While he stated that the mandatory maternity rule had been adopted as a result of students' giggling embarrassing pregnant teachers and disrupting the classroom (A. 173), he could recall no particular instance of such disruption (A. 183). Dr. Schinnerer also testified that while pregnancy did not always result in the disruption of a classroom in the elementary school level, it "very nearly always" did so at the secondary level (A. 182). However, Mr. Tanczos, Supervisor of Secondary Education, in keeping with the testimony of both Mrs. LaFleur and Mrs. Tucker, testified that he had never received reports of students giggling either at pregnant teachers or at pregnant students (A. 203). Mr. Tanczos had been employed by the Cleveland Board of Education since 1950, and had been Supervisor of Secondary Education since 1961 (A. 191).

2. Continuity of Classroom Instruction is Often More Hindered than Helped by a Mandatory Maternity Leave Rule

While one of Petitioners' witnesses felt that the absence of a maternity rule would disrupt the educational process (A. 198-199), the evidence presented at hearing demonstrated the disruptive nature of the rule itself.

Mrs. LaFleur and Mrs. Nelson were both expecting their babies in mid-summer (A. 37, 38). Both Respondents were concerned that the enforcement of the maternity rule would cause unnecessary disruption in their students' educational programs. Mrs. Nelson asked to be permitted to continue teaching until April 8, 1971, the first day of spring vacation, so that her departure would be less

disruptive to the children (A. 33, 43, 51). On April 6, 1971, after this request had been denied and her resignation accepted, Mrs. Nelson sought to revoke her resignation (A. 36, 43). At hearing, she testified that she was prepared to return to school and believed that she could complete the semester (A. 53). Mrs. LaFleur testified that she "was greatly upset at being told she could not finish the year" (A. 68), and that she continued to report for work each day during the week following her required departure although she was not permitted to teach (A. 70).

Mrs. Nelson, a French teacher, was replaced by Marie Pocrant, a teacher who did her school training in Spanish (A. 54). Mrs. LaFleur was replaced by Rosemarie Sutter, a teacher intern (A. 41-42, 73). Testimony of one of Petitioners' witnesses, Dr. Schinnerer, established that when teachers left in the middle of a semester, the school would "generally just fill in with a substitute." When asked whether a pregnant teacher would ever have been continued past the cut-off time until a suitable replacement could be found, this witness answered: "No" (A. 184). Another of Petitioners' witnesses, Mr. Tanczos, testified that several teachers who had left positions had been replaced by students (A. 210-211).

Teacher turnover in Cleveland's inner-city schools averages between fifteen and twenty percent. This figure is higher than the turnover rate in suburban school systems or in city schools not in the inner-city (A. 214). Both Mrs. LaFleur and Mrs. Nelson taught students who had already had teachers leave earlier during the school year. Mrs. Nelson testified that her students "wanted to know how many teachers they were going to have before the end of the year" (A. 48). At Christmas time, 1970, when school authorities had already been advised of Mrs. LaFleur's pregnancy and had informed her that she would

not be permitted to teach through the end of the school year, the Board of Education changed Mrs. LaFleur's teaching assignment from that of ninth grade English to a seventh grade "Transition" class of underachievers (A. 41, 64, 68, 209-210). Mrs. LaFleur testified that her students were noticeably disappointed when they learned that she would have to leave (A.71).

D. PETITIONERS ADMIT THAT THEIR ADMINISTRATIVE REQUIREMENTS WOULD BE MET MERELY BY REQUIRING A TEACHER TO GIVE ADEQUATE ADVANCE NOTICE OF HER INTENTION TO TAKE MATERNITY LEAVE

Petitioners have stressed the administrative problems which would occur if the Board of Education had no mandatory maternity rule (Pet. Br. 11-12). However, teacher replacement upon short notice was the only administrative problem identified by Petitioners' witnesses (A. 198).

No notice of any kind is sought of a teacher who must leave school in the middle of the year due to a medical disability other than pregnancy (A. 206-207). In this situation a leave of absence will be arranged through personal contact or by talking to the doctor to see what he recommends (A. 180). Petitioners' witnesses were aware that the Board of Education could place a teacher on an unrequested—and involuntary—leave of absence in the event a teacher was unable to continue to carry out his teaching duties (A. 179-180, 206). This power apparently has never been used except to give a leave of absence to a person departing for military service who did not think to request one (A. 180).

Mr. Tanczos, Supervisor of Secondary Education, admitted on cross-examination that the problem of a lack

of uniformity in the amount of notice given by teachers taking maternity leave could be cured by a rule requiring adequate notice of the pregnant teacher's intention to leave (A. 206).

SUMMARY OF ARGUMENT

The Cleveland Board of Education has adopted a mandatory maternity rule placing its pregnant teachers in a special category to their disadvantage. By requiring pregnant women to take an unpaid leave of absence during the last five months of pregnancy and for at least three months thereafter, the Board of Education, acting on stereotypical notions of what a pregnant woman should or should not do, has discriminated against its female employees on the basis of their sex. Respondents allege that the proper standard of review under the equal protection clause here must be one of strictest scrutiny. Sex is as immutable a characteristic of birth as other classifications now held to be suspect and so also should be accorded such treatment. In addition, the mandatory nature of the regulation penalizes the fundamental right of women to bear children and so, for this reason alone, also requires application of the strictest standard standard of review. Under such a standard, the regulation necessarily must be invalid since less objectionable means are available to accomplish any legitimate purpose which the rule purports to serve.

Even if a more lenient test of equal protection were used to review the case, Respondents believe the mandatory maternity regulation must be invalid. The origins of the regulation reveal no more important objective served then insuring that students will not be taught by obviously pregnant teachers at whose condition they might giggle or

joke. Application of the present rule promotes classroom *discontinuity* since each Respondent otherwise could have continued teaching through the end of the school year. In addition, the regulation fails to serve any medical objective: All experts testifying agreed that medical authority today does not prohibit women whose pregnancies are without complication from engaging in normal physical activity.

The mandatory maternity rule, in addition to being aimed at an impermissible legislative goal, embodies certain irrebuttable presumptions which have either been disproven or are irrelevant. One presumption is that the pregnant teacher cannot perform her teaching duties; another is that her pregnancy is voluntarily incurred and for this reason more stringent treatment is justified than that accorded teachers with other medical disabilities.

Finally, administrative reasons do not require a mandatory leave rule. Testimony of one of Petitioners' witnesses establishes that the need is merely one of reasonable notice to insure timely teacher replacement. Furthermore, Petitioners' justification of administrative convenience is inconsistent with the established record in this case. Without a mandatory leave rule there would have been no need to replace either Respondent prior to the close of the academic year. Allegations of administrative convenience therefore are legally insufficient to save Petitioners' discriminatory rule.

ARGUMENT

I. TO REQUIRE A WOMAN TO STOP TEACHING SOLELY BECAUSE SHE IS PREGNANT OR HAS RECENTLY BECOME A MOTHER IS TO DISCRIMINATE AGAINST HER ON ACCOUNT OF HER SEX

Regulations seemingly neutral on their face, which single out members of only one sex for special treatment discriminate on the basis of sex. This has been well established by recent judicial authority in litigation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The Court of Appeals for the Seventh Circuit in considering whether or not an airline could refuse to employ married women as flight attendants, early pointed out: "[D]iscrimination is not to be tolerated under the guise of physical properties possessed by one sex." *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971). That some, rather than all, members of one sex are affected does not legitimize an otherwise discriminatory provision. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). In *Phillips* the Court considered a refusal to hire women with preschool age children. As Chief Judge Brown stated, dissenting from denial of a motion for rehearing *en banc*, in *Phillips*:

> "Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman.
>
> It is the fact of the person being a mother—i.e., a woman—not the age of the children, which denies employment opportunity to a woman which is open to a man." 416 F.2d 1247, 1259 (5th Cir. 1969).

These principles, already often considered by courts, both federal and state, are responsible for the growing body of case law and administrative rulings which hold that classifications which treat pregnancy differently from

other temporary medical disabilities discriminate against women on the basis of their sex.

To date court decisions have centered on two related disabilities imposed on pregnant women: (1) the common employer practice of terminating a pregnant employee or requiring her to take a leave of absence when she is medically able to work; and (2) the equally often encountered denial of unemployment compensation or disability insurance benefits to women who are able to work and seeking employment while pregnant. Often the same women are affected by both these practices, first being discharged by their employers for being pregnant, then being denied unemployment or disability compensation awards by the state.

Court decisions in federal and state courts have now rejected mandatory maternity leave regulations on a variety of grounds. In some instances these cases have been decided simply as contract cases under state law.[5] In others, courts have decided that such employer practices discriminate against women on the basis of their sex and are unconstitutional.

Prior to the decision of the Court of Appeals for the Sixth Circuit below, the United States District Court for the Southern District of Ohio, ruling on a mandatory maternity leave case, refused to follow the precedent of the Northern District of Ohio in *LaFleur*. Judge Rubin, in deciding whether the maternity policy of the Westerville Board of Education discriminated against women, noted

[5] *See e. g., Schlueter v. School District No. 42 of Madison County*, 168 Neb. 443, 96 N.W.2d 203 (1959), awarding a teacher discharged for pregnancy back pay for the five months remaining of her contract; *Boatright v. School District No. 6 of Arapahoe County*, 160 Colo. 163, 415 P.2d 340 (1966), upholding a Board of Education's refusal to permit a newly hired teacher to teach after learning that her child was less than a year old where the Board's maternity policy prohibited a teacher from returning to work until the semester following the date of the child's first birthday.

that: "Other societies . . . consider [pregnancy] a far less debilitating condition than does American society."[6] The Southern District of Ohio then held:

> "Any regulation which sets an arbitrary and fixed date by which pregnant employees must resign must be based on presumptions concerning sexual characteristics and roles as no two pregnancies present identical medical or psychological problems. Such a regulation, unless it is supported by a reasonable, factual basis is discriminatory against women . . . " *Heath v. Westerville Board of Education,* 345 F. Supp. 501, 507 (S.D. Ohio 1972).

Earlier this year, in *Green v. Waterford Board of Education,* 473 F.2d 629 (2d Cir. 1973), another mandatory maternity leave case, the Second Circuit Court of Appeals was also persuaded that a forced maternity rule encompasses a sexually discriminatory classification:

> "Plaintiff admits the obvious, that men do not become pregnant, but points out that men, being human, are also subject to crises of the body, some of which, like childbirth, give ample warning: A cataract operation or a prostatectomy, for example, may be planned months ahead. Because male teachers are not forced by defendant Board to take premature leave because of a known forthcoming medical problem, female teachers should not be treated differently. Thus

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[6] The Southern District of Ohio considered writings of Ashley Montague on the effect of pregnancy on women in nonliterate societies, MONTAGUE, THE NATURAL SUPERIORITY OF WOMEN 16-17 (rev. ed. 1970), and concluded: "This tends to suggest that the defendant Board's very solicitous treatment of pregnancy, including the requirement that the new mother not return to her job for one year following delivery is more a manifestation of cultural sex role conditioning than a response to medical fact and necessity. The fact that Mrs. Heath does not fit neatly into the stereotyped vision the defendant Board has of the 'correct' female response to pregnancy should not redound to her economic or professional detriment." *Heath v. Westerville Board of Education,* 345 F. Supp. 501, 505-506, n. 1 (S.D. Ohio 1972).

stated, the argument is persuasive, even compelling. One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed." 473 F.2d at 634.

Still more recently, the Tenth Circuit Court of Appeals in *Buckley v. Coyle Public School System*, 476 F.2d 92 (10th Cir. 1973), considered a mandatory maternity rule and concluded that it was sexually discriminatory:

> "We start with the most obvious of the alleged violations and that is the charge of discrimination based on sex. The trial court's attempted distinction between discriminatory and non-discriminatory regulations as being whether the condition involved is one which was involuntary must be rejected. The fact, if it be a fact, that pregnancy is a voluntary status really has nothing to do with the question. *The point is that the regulation penalizes the feminine school teacher for being a woman and, therefore, it must be condemned on that ground.*" 476 F.2d at 94 (*emphasis added*).

Many federal district courts have been similarly persuaded that mandatory maternity rules discriminate against women on the basis of their sex. *Seamen v. Spring Lake Park Independent School District, No. 16*, ___ F. Supp. ___, 5 EPD ¶ 8467 (D. Minn 1973); *Bravo v. Board of Education*, 345 F. Supp. 155 (D. Ill. 1972); *Pocklington v. Duval County School Board*, 345 F. Supp. 163 (D. Fla. 1972); *Monell v. Department of Social Services*, ___ F. Supp. ___, 4 FEP Cases 883 (S.D.N.Y. 1972); *Williams v. San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Cal. 1972). *See also, Jinks v. May*, 332 F. Supp. 254 (N.D. Ga. 1971); *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971).

In a case raising the issue of whether a denial of disability insurance benefits to otherwise qualified, although

pregnant, women, discriminates on the basis of sex, a three-judge court, after citing *Heath, supra,* with favor, stated:

> ". . . a realistic look at what women actually do even in our society belies the belief that they cannot generally work throughout pregnancy . . . Nevertheless, the belief that pregnant women are disabled for substantial periods results in their being denied the opportunity to work, unemployment compensation benefits designed to aid those able to work, and—because of the belief that they will submit large claims—disability insurance benefits. *See generally,* Walker, *Sex Discrimination in Benefits Programs,* 23 HASTINGS L. J. 277, 282-84, 285 (1971). Thus, the apparently solicitous attitude that pregnant women are in a 'delicate condition' has the effect that they often cannot earn an income or obtain the usual social welfare benefits for the unemployed. The only way to assure that this irrational result is not simply the product of mistaken stereotypical beliefs is to require, as the equal protection clause does, that each pregnant woman be considered individually". *Aiello v. Hansen,* ___ F. Supp. ___, No. C 72-1402 SW slip opinion at p. 13 (N.D. Calif. May 31, 1973) (three-judge court) (citations omitted).

Sex discrimination has been prohibited under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and legislation of many states. Interpretation of these statutes by courts and administrative agencies has tended to follow the lead of those federal courts which have found that when more restrictions are imposed upon pregnant wom-

en than upon persons with other temporary medical disabilities, sex discrimination has occurred.[7]

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[7] Administrative interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, specifically provides that an employer's refusal to treat pregnancy like other temporary disabilities is in violation of the Act's prohibition of sex discrimination. 29 C. F. R. § 1604.10. Other federal agencies agree that an employer's failure to accord pregnancy as advantageous treatment as other temporary medical disabilities is today illegal. *See*, U. S. Dep't of Labor, Office of Federal Contract Compliance, *Sex Discrimination Guidelines*, 41 C. F. R. 60-20.3(g); Department of Health, Education and Welfare, *Higher Education Guidelines*, 37 Fed. Reg. 224, p. 24686 (1972).

The following are illustrative of state court decisions: *Cerra v. East Stroudsburg Area School District*, 299 A.2d 277 (Pa. S. Ct. 1973); *Orner v. Board of Appeals*, Case No. 132572 (Super. Ct., Balt. City, July 28, 1972); *Allison v. Board of Education Union Free School District No. 22, Nassau*, 333 N.Y.S.2d 261 (1972); *Sable v. Wantagh School District No. 23*, 331 N.Y.S. 2d 686 (1972); *Truax v. Edmonds School District #15*, Dkt. No. 107915 (Super. Ct., Snohomism County, Washington, July 30, 1971); *Blair v. New Milford Board of Education*, No. EO 2Es-5337 (Sup. Ct. Hackensack, N.J.) (Jan. 20, 1971).

State administrative rulings include decisions such as *Awadallah v. New Milford Board of Education*, N.J. Dept. Law and Public Safety (Sept. 29, 1971); and *Colley v. Board of Education*, Department of Human Relations, Waterford, Wisconsin (Feb. 1, 1971), and opinions of attorneys general interpreting restrictions on the right of pregnant women to work as illegal. *See, e. g.*, Opinion of Michigan Attorney General, February 18, 1972.

For a discussion of arbitration decisions *see*, Sipser, *Maternity Leave: Judicial and Arbitral Interpretation*, 1970 - 1972, 24 LABOR LAW JOURNAL 173 (March, 1973).

For legal comment on these matters, *see generally*, Koontz, *Childbirth and Child Rearing Leave: Job Related Benefits*, 17 N.Y.L.F. 480 (1971); Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 HARV. CIV. RTS. CIV. LIBS. L. REV. 260 (1972).

While not unanimous,[8] the great weight of judicial authority today is in keeping with the Court of Appeals for the Sixth Circuit. That court, when considering the mandatory maternity regulation here challenged, concluded:

> ". . . we deal with a rule which is inherently based upon a classification by sex. Male teachers are not subject to pregnancy, but they are subject to many types of illnesses and disabilities." *LaFleur v. Cleveland Board of Education*, 465 F.2d 1184, 1188 (6th Cir. 1972).

II. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBITS RESTRICTING THE EMPLOYMENT RIGHTS OF WOMEN WHO GIVE BIRTH WHEN SIMILAR RESTRICTIONS HAVE NOT BEEN PLACED UPON EMPLOYEES WITH OTHER TEMPORARY MEDICAL DISABILITIES

Chief Judge Haynesworth has noted that since: "[O]nly women experience pregnancy and motherhood . . . all possibility of competition between the sexes in this area" is removed. *Cohen v. Chesterfield County School Board*, 474 F.2d 395, 397 (4th Cir. 1973). While men can-

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[8] *See, Cohen v. Chesterfield County School Board*, 474 F.2d 395 (4th Cir. 1972), *cert. granted*, ___ U. S. ___, 93 S. Ct. 1925 (1973); *Schattman v. Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), *cert. den.*, ___ U. S. ___, 93 S. Ct. 901 (1973), *reh. den.*, ___ U. S. ___, 93 S. Ct. 1414 (1973); *Paxman v. Wilkerson*, ___ F. Supp. ___, 5 FEP Cases 675 (E. D. Va. 1973). *See also*, the military maternity cases: *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), *cert. granted*, ___ U. S. ___, 93 S. Ct. 292 (1972), *judgment vacated and case remanded for determination of mootness*, ___ U. S. ___, 93 S. Ct. 676 (1972); *Gutierrez v. Laird*, 346 F. Supp. 289 (D. D. C. 1972); and *Flores v. Secretary of Defense*, 355 F. Supp. 93 (N.D. Fla. 1973); *contra, Robinson v. Rand*, 340 F. Supp. 37 (D. Colo. 1972).

not bear children, they are subject to other temporary medical disabilities.[9]

Man's non-pregnant state, in logic, carries with it no necessary conclusion that men, therefore, should gain some imposed advantage over women in the competition of the market place. Most women work at some time during their lives,[10] and most women bear children.[11] Employment opportunity for the two sexes remains unequal[12] and disabilities imposed upon pregnancy bear a major responsibility for woman's economically disadvantaged lot.[13]

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[9] A recent study analyzing absenteeism and labor turnover found that although women lost more worktime because of acute conditions, men lost more time because of chronic conditions. As such, the total financial loss caused by all absences of women was about the same as that caused by absences of men. U. S. Dep't. of Labor, Wage & Labor Standards Administration, *Facts About Women's Absenteeism and Labor Turnover* (1969). *See also,* case study demonstrating that implementation of the Equal Employment Opportunity Commission's *Guidelines on Discrimination Because of Sex,* Title 29, Chapter XIV, Part 1604, Section 1604.1 to 1604.10 as amended, requiring employers to treat pregnancy like other temporary medical disabilities for purposes of sick leave and disability benefits, would have a negligible impact upon labor costs. Greenwald, *Maternity Leave Policy,* NEW ENGLAND ECONOMIC REVIEW, p. 13 (Jan./Feb. 1973).

[10] During 1972, only 11% of all women aged 16 and over had never been in the labor market. U. S. Dep't of Labor, Bureau of Labor Statistics, 19 *Employment and Earnings* No. 7, Table 33, p. 148 (1973).

[11] Only 15.6% of married women, age 20 and over, are childless. U. S. Dep't of Commerce, Bureau of the Census, *Census of Population 1970, Detailed Characteristics,* P.C. (1)-D1-U.S. Summary Table 212, p. 41 (1971).

[12] During 1972, earnings of full-time, year-round women workers averaged only 59.5% of men's wages. U. S. Dep't of Commerce, Bureau of the Census, "Money Income in 1971 of Families and Persons in The United States", Table 56, *Current Population Reports,* Series P-60, No. 85 (1972).

[13] Testimony of Herbert Stein and Marjorie Whitman of the President's Council of Economic Advisors before the Senate-House Joint Economic Committee, July 10, 1973, points to lack of continuous work experience being a most important factor in women's lower salary levels. (See pages 4-7 of authors' manuscript of testimony).

Since, in this case, as in others,[14] no general rule of an inflexible nature has been adopted with respect to other types of medical conditions which employees suffer, Respondents contend that their treatment at the hands of the Cleveland Board of Education has been discriminatory in violation of the equal protection of the laws which the Fourteenth Amendment guarantees them.

In considering the claim of Petitioners that the Court of Appeals for the Sixth Circuit has strayed outside proper constitutional bounds in ruling in favor of the Respondents, the first question for this Court's attention is the appropriate standard of review. Petitioners have suggested that selection of the proper test of equal protection should be tailored to the subject matter of inquiry before the court. Since *San Antonio Independent School District v. Rodriguez*, ___ U. S. ___, 93 S. Ct. 1278 (1973), deals with school financing, Petitioners contend that the most lenient test of equal protection there used should govern in this case. On the other hand, for reasons unclear, Petitioners assert that the test of equal protection used in *Frontiero v. Richardson*, ___ U. S. ___ 93 S. Ct. 1764 (1973), is inappropriate here (Pet. Br. 2-3). Respondents can only speculate that perhaps the claimed lack of relevance of *Frontiero* results from its consideration of a military, rather than a school, matter. In fact, *Frontiero* like *La Fleur* relates to the employment rights of women, and is readily distinguishable from *Rodriguez* where this Court itself, recognizing a most important distinction, held the Texas school financing plan not to be the "product of purposeful discrimination against any group or class." *Rodriguez*, 93 S. Ct. at 1308.

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[14] To the best of Respondents' knowledge, in no school board mandatory maternity case has any board of education adopted an inflexible rule applying to any temporary medical disability other than pregnancy.

Despite the imaginative nature of Petitioners' comments concerning the proper selection of an equal protection test, Respondents firmly believe that usual methods of analysis are appropriate to determine the test here to be applied. Such an analysis dictates affirmance of the ruling of the Court of Appeals.

A. The Standard of Review

The Fourteenth Amendment's test of equal protection, used from early days in the history of this Court, traditionally has upheld a classification if it could be shown that the classification had a reasonable and just relation to a permissible legislative objective. As the court stated in *F. S. Royster Guano Co. v. Virginia,* 253 U.S. 412 (1920):

> ". . . the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." 253 U.S. at 415.

In recent years, however, the Court has recognized that under certain circumstances a more rigid standard of review must be applied. The invidious nature of the distinction requires more attentive review when classifications distinguish on the basis of characteristics pointed out by Justice Stewart in his concurring opinion in *Rodriguez,* such as a person's race, *McLaughlin v. Florida,* 379 U.S. 184 (1964); national origin, *Oyama v. California,* 332 U.S. 633, 644-646 (1948); alienage, *Graham v. Richardson,* 403 U.S. 365, 372 (1971); indigency, *Griffin v. Illinois,* 351 U.S. 12 (1956); or illegitimacy, *Gomez v. Perez,* ___ U.S. ___, 93 S. Ct. 872 (1973); *Weber v. Aetna Casualty and Surety Co.,* 406 U.S. 164 (1972); *Rodriguez,* 93 S. Ct. at 1311.

Labeling classifications of this kind "suspect," the court now subjects them to rigid scrutiny and requires a showing of a compelling government interest to uphold them. The rationale for requiring proof of a compelling government need for such classifications is clear: An individual should not be penalized for an accident of birth over which he has no control. *Frontiero*, 93 S. Ct. at 1770.

The court has also applied the stricter standard of review where classifications adversely affect a fundamental right explicitly or implicitly protected by the Constitution. *Rodriguez*, 93 S. Ct. at 1297. When fundamental rights are at stake, the government must show that its challenged rule is the "least restrictive alternative" available to accomplish the required governmental objective. *Rodriguez*, 93 S. Ct. at 1306.

1. Petitioners' Mandatory Maternity Rule Must Be Subjected to Strict Judicial Scrutiny for Two Reasons, Either One of Which Alone Would Require Its Use

Strict judicial scrutiny must be exercised where a classification is suspect or where it impairs fundamental rights. Respondents contend that where, as here, a suspect classification adversely affects fundamental rights, it is particularly appropriate to require Petitioners to demonstrate that their regulation, which singles out and restricts the right to work of its pregnant employees, is both necessary and "the least restrictive alternative" available. *Buckley, supra*, 476 F. 2d at 96; *Sail'er Inn, Inc., v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971).

(a) The Maternity Regulation Creates a Classification Based on Sex and Now Must Be Considered Suspect

Respondents contend that the Petitioners' mandatory maternity rule embodies a classification based upon sex.

A person's sex is a constant personal characteristic similar to other indicia which have led classifications to be declared suspect. At the same time, it is as irrelevant as these other immutable characteristics to a person's ability to contribute to society. For these reasons, four Justices of this Court, finding "implicit support" for their approach from *Reed v. Reed*, 404 U.S. 71 (1971), have now concluded that classifications based upon sex must be subjected to strict judicial scrutiny. *Frontiero*, 93 S. Ct. at 1771.

Respondents believe that examination of cases earlier decided by this Court will demonstrate that the plurality opinion of *Frontiero* represents no abrubt break with established judicial precedent, but indeed, for the first time, states clearly a position now long overdue.

(i) *Muller and Goesaert Are Now Outdated*

Prior to the development of a separate test of equal protection for classifications which are suspect or which adversely affect fundamental rights, this Court had been presented with only a handful of cases involving classifications based on sex. Still fewer of these cases raised important issues relating to the employment of women. *Muller v. Oregon*, 208 U.S. 412 (1908), was the first of these employment cases; *Goesaert v. Cleary*, 335 U.S. 464 (1948), was the last decided by this Court prior to *Frontiero*. In both *Muller* and *Goesaert*, the Court, using a lenient standard of review, upheld the legislative classifications challenged. Over the years these decisions have been strongly criticized by courts and commentators.[15]

In *Muller v. Oregon*, the Court confronted the issue whether a limitation on the number of hours which women might work in certain types of establishments should

[15] *See, infra* pp. 30, 32-35.

be upheld. Earlier, in *Lochner v. New York*, 198 U.S. 45 (1905), the courts had struck down a state statute limiting the number of hours per day and per week that men and women could work in bakeries. While in *Lochner* the court refused to countenance a general limitation on hours of work, in *Muller*, it deemed it permissible to do so since only women were affected. In upholding the sexual classification challenged, the Court, in *Muller*, commented at length on woman's inferior position and status:

> "[H]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. . . . Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. . . . Doubtless there are individual exceptions . . . but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality." 208 U.S. at 421-22.

The Supreme Court's opinion in *Muller* was first criticized judicially more than fifty years ago in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), when the court upheld as valid a minimum wage statute of the District of Columbia. While the Court took care not to overrule *Muller*, it was not able to accept:

> ". . . the doctrine that women of mature age, sui juris, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the

implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships." 261 U. S. at 553.

The authority of *Adkins* was gradually eroded in later cases [16] and eventually was reversed by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), where the Court upheld as constitutional a Washington statute establishing a minimum wage for women. The reasoning of the court in *Parrish* took note of woman's employment status:

> ". . . they are in the class receiving the least pay, . . . their bargaining power is relatively weak, and . . . they are the ready victims of those who would take advantage of their necessitous circumstances . . . The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The base cost of living must be met . . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers." 300 U.S. at 398-399.

The decisions of this Court in *Muller*, *Adkins*, and *Parrish*, in light of *Lochner* all assumed the unconstitutionality of protective legislation applying equally to men and women. Beginning from this now outdated starting point, the Court reached different conclusions whether restrictions on working hours might be imposed on women alone. A contemporary reading of the three cases with

[16] See discussion of specific cases in *West Coast Hotel Co. v. Parrish*, 300 U.S. at 397-398.

respect to this Court's interpretation of the equal protection clause suggests that the Court's better reasoning was expressed in *Adkins*. While *Muller* is all too often cited in support of those who would shore-up out-moded views of woman's place, the more modern approach of *Adkins*, is generally now forgotten. *See, e.g.*, citation to *Muller* in the District Court's opinion in *LaFleur*, 326 F. Supp. at 1212.

The Court of Appeals for the Ninth Circuit and the California Supreme Court are the first appellate courts since *Adkins* to comment adversely on *Muller's* stereotypical view of the female sex. *Mengelkoch v. Industrial Welfare Commission*, 442 F.2d 1119 (9th Cir. 1971); *Sail'er Inn, Inc. v. Kirby, supra*. The Court of Appeals in *Mengelkoch*, where a state statute limiting the hours of work for women was the subject of the challenge, pointed to a number of reasons why it could find no precedential value in *Muller*. Of primary present concern is the fact that in *Muller*, no invidious discrimination was ever claimed by a member of the class allegedly being protected—women themselves. Rather the employer was seeking relief from complying with the requirements of the statute. 442 F.2d at 1123. In *Sail'er Inn*, the California Supreme Court, in a unanimous opinion, commented with blunt honesty on the equal protection rationale of *Muller*: "No judge today would justify classifications based on sex by resort to such openly biased and wholly chauvinistic statements as this one made by Justice Brewer in *Muller* . . . ." 5 Cal. 3d at 17, n. 15.

Scholarly comment of *Muller* has mirrored judicial criticism. The views of the *Muller* court were labeled "male supremacist assumptions," by two legal scholars in a recent article.[17] Another legal writer concluded that

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[17] Johnson, Jr., and Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. Rev. 675, 699 (1971).

the *Muller* decision, "served to strengthen sex bias," and reflected views of a different era. Professor Murray voiced the need for *Muller* now to be re-examined and discarded:

> "The *Muller* decision reflected an era when women were politically disfranchised, represented only about 18% of the labor force, lacked the protection of strong unionization or federal labor standards legislation, and were particularly vulnerable to extreme forms of exploitation. It also reflected the traditional view of male dominance through the Court's paternalistic observation that woman is so constituted that she would continue to depend upon and look to man for protection even if all statutory restrictions were removed and she stood on an absolutely equal plane with him.
>
> The sweeping language of the *Muller* decision served to strengthen sex bias. . . . Whatever may have been the justification for the legal protection of women workers in 1908, the doctrine that 'sex is a valid basis for classification,' like the racial 'separate but equal . . .', has produced discriminatory results which overshadow any continuing utility. In the light of changed conditions and attitudes, *Muller* should be re-examined and discarded." MURRAY, THE RIGHTS OF WOMEN, THE RIGHTS OF AMERICANS, 521, 524 (N. Dorsen, ed. 1971).

In *Goesaert v. Cleary, supra,* the Supreme Court decided another employment case arising under the Fourteenth Amendment. In *Goesaert,* the court upheld a state statute barring women from employment as bartenders in the same establishments in which they were permitted to serve as waitresses. Relying on *Muller* as a precedent, Justice Frankfurter refused to consider the economic detriment allegedly imposed on women by the statute, and opted for a static interpretation of the Constitution. 335 U.S. at 466. Without commenting specifically on his earlier opinion in *Goesaert,* Justice Frankfurter in later years

retreated from the narrow view that he had taken there and, refusing "to be obfuscated by medieval views regarding the legal status of women and the common law's reflection of them," declined to follow an ancient common law doctrine that man and wife are legally one. *U. S. v. Dege*, 364 U.S. 51, 52 (1960).

With *Goesaert* reposing on the shaky basis of *Muller*, it is not surprising that both courts and commentators in recent times have refused to acknowledge its authority. The New Jersey Supreme Court, struck down a local ordinance barring women from employment as bartenders in *Paterson Tavern & Grill Owners Assn. v. Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1970). Finding that the ordinance was not a necessary and reasonable exercise of the police power, the court stated: "In the current climate the law may not tolerate blanket municipal bartending exclusions grounded solely on sex." 57 N. J. at 189, 270 A.2d at 633.

More recently, the California Supreme Court has invalidated a state statute similar to the one upheld in *Goesaert*, specifically refusing to follow the earlier case as precedent. *Sail'er Inn, supra*. Pointing out that *Goesaert* was decided "well before the recent and major growth of public concern about and opposition to sex discrimination," 5 Cal. 3d at 21, n.15, the court went on to note that while "*Goesaert* has not been overruled, its holding has been the subject of academic criticism." 5 Cal. 3d at 21. The court made specific mention of the criticism leveled at *Goesaert* in KANOWITZ, WOMEN AND THE LAW, pp. 33-34 (1969), and Oldham, *Sex Discrimination and State Protective Laws*, 44 DEN. L. J., 344, 373-374 (1967). Other recent commentators have also been far from charitable to *Goesaert*. An article in the YALE LAW JOURNAL suggests that. ". . . Justice Frankfurter's off-hand dismissal of

women's basic civil rights to engage in an occupation might seem outrageous today. . . ." Emerson, et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L. J. 872, 873 (1971), while Johnson, Jr. and Knapp, *supra*, n.16, regard the view of *Sail'er Inn*, to be "a remarkable decision . . . irreconcilable with the sexist assumptions underlying [*Goesaert*]." 46 N. Y. U. L. REV. at 690, 691. In their independent examination of the equal protection cases involving sex discrimination, Johnson, Jr. and Knapp concluded:

> ". . . by and large the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable. With some notable exceptions, they have failed to bring to sex discrimination cases those judicial virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues. Particularly striking, we believe, is the contrast between judicial attitudes toward sex and race discrimination. Judges have largely freed themselves from patterns of thought that can be stigmatized as "racist"—at least their opinions in that area exhibit a conscious attempt to free themselves from habits of stereotypical thought with regard to discrimination based on *color*. With respect to *sex* discrimination, however, the story is different. 'Sexism,'—the making of unjustified (or at least unsupported) assumptions about individual capacities, interests, goals and social roles solely on the basis of sex differences—is as easily discernible in contemporary judicial opinions as racism ever was." *Id.* at 676.

It is hardly surprising that this Court upheld sexually discriminatory classifications as constitutional in *Muller*, and in *Goesaert;* only in recent years has the strict standard of review been uniformly used to test invidious classifi-

cations. While the Court has had occasion to consider other cases involving Fourteenth Amendment challenges to classifications based on sex, since *Goesaert* only one of these, *Frontiero, supra,* has related to women's employment rights. Examination of the Fourteenth Amendment sex discrimination cases presented to the Court during this decade reveals that all have involved classifications so ill-suited to accomplish any legitimate governmental objective that this Court has found them unable to be sustained under the lenient test of reasonableness.[18]

(ii) *The Time is Now Appropriate for this Court to Declare Sex Discrimination No Less Invidious than Other Types of Discrimination Now Declared to be Suspect.*

The present case is a particularly appropriate one for this Court to make clear that invidious sex discrimination will not be countenanced.

Recently the Court has set forth the "traditional indicia" of a classification that is suspect. In denying suspect status in the Texas School financing case, the Court described these characteristics:

> "[T]he class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Rodriguez,* 93 S. Ct. at 1294.

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[18] *Reed v. Reed,* 404 U.S. 71 (1971) (striking down a mandatory provision of the Idaho probate code which preferred men over women in the administration of a decedent's estate); *Stanley v. Illinois,* 405 U.S. 645 (1972) (declaring unconstitutional legislation denying unwed fathers parental status); and *Frontiero v. Richardson,* ___ U.S. ___, 93 S. Ct. 1764 (concurring opinion) (1973), (declaring unconstitutional federal statutes which provided that spouses of male members of the armed forces are dependents but that spouses of female members are not dependents unless they are in fact dependent).

Women as a class historically have been saddled with weighty burdens of varied nature exhibiting all, rather than just one, of these traditional indicia. Quoting from Justice Bradley's opinion one hundred years ago in *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873), Justice Brennan, in *Frontiero*, points out that our nation has had a long and unfortunate history of sex discrimination. Our statute books have gradually become "laden with gross, stereotypical distinctions between the sexes," 93 S. Ct. at 1769. Justice Brennan's opinion in *Frontiero* also recognizes that:

> "[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself 'preservative of other basic civil and political rights'—until adoption of the Nineteenth Amendment half a century ago." 93 S. Ct. at 1769-1770 (citations and footnotes omitted).

After noting that the position of women has improved in recent decades, Mr. Justice Brennan, writing for the plurality in *Frontiero*, states:

> "Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, *on the job market* and, perhaps most conspicuously, in the political arena." 93 S. Ct. at 1770 (citations and footnotes omitted) (emphasis added).

The *Frontiero* plurality also recognized the vast underrepresentation of women at decision making levels of government. Pointing specifically to the Presidency, this Court itself, the United States Congress, and all levels of state and federal government, Mr. Justice Brennan therein explained this underrepresentation to be in part a present effect of past discrimination. 93 S. Ct. at 1770, n .17.

The United States Congress in the days of *Muller* and *Goesaert* took no broad position prohibiting sex discrimination in employment. With the enactment of the Equal Pay Act of 1963, 29 U.S.C. § 201 (d) *et seq.*, shortly followed by the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, national policy of the United States finally focused on the elimination of invidious discrimination whether based on race, color, religion, sex or national origin. While the new legislation at first did not apply to governmental employers, this omission has now been rectified. The Equal Employment Opportunity Act of 1972, Public Law 92-261. Prior to enactment of this amendatory legislation, a number of cases questioned whether the Fourteenth Amendment required public employers to be held to Title VII standards in race discrimination cases. The Courts of Appeal for the First,[19] Second[20] and Eighth[21] Circuits have now all applied Title VII testing standards to Fourteenth Amendment cases.

Since Congressional intent, as evidenced in the Civil Rights Act of 1964, now places sex discrimination in employment on as illegal a footing as the other types of discrimination attacked, that Act indicates that, particularly in employment descrimination cases, national policy now

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[19] *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972).

[20] *Chance v. Board of Examiners*, 458 F.2d 1167 (2nd Cir. 1972).

[21] *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1972), *cert. den.* 406 U.S. 950 (1972).

requires classifications based on sex to be tested against no more lenient a standard that that applied to other characteristics also rendered illegal by the Act. Such treatment has been called for by legal scholars,[22] and indeed, the state courts of California now require that the same strict standard of review be exercized in sex discrimination cases as those based on race or ancestry.

In *Sail'er Inn v. Kirby*, the California Supreme Court, after recognizing *U.S. ex rel. Robinson v. York*, 281 F. Supp. 8 (D. Conn. 1968), as a precedent for placing sex in a suspect category, explained at length why sexual classifications deserve such treatment, particularly in those instances where the plaintiff seeks relief from employment discrimination:

> "Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. Where the relations between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.
>
> "Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. Women, like Negroes, aliens, and the poor have historical-

[22] *See*, Note, *Are Sex-Based Classifications Constitutionally Suspect?*, 66 Nw. U. L. Rev. 481 (1971); Note, *Fair Employment-Is Pregnancy A Sufficient Reason For Dismissal Of A Public Employee?*, 52 Bost U. L. Rev. 196, 201 (1972).

ly labored under severe legal and social disabilities. Like black citizens, they were, for many years, denied the right to vote and, until recently, the right to serve on juries in many states. They are excluded from or discriminated against in employment and educational opportunities. Married women in particular have been treated as inferior persons in numerous laws relating to property and independent business ownership and the right to make contracts.

"Laws which disable women from full participation in the political, business and economic arenas are often characterized as 'protective' and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage. We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment." 5 Cal. 3d at 18 (citations and footnotes omitted).

The indicia of suspect status earlier described, and the goals of national policy established by the Congress of the United States now require this Court to recognize that sex is at least as immutable a characteristic of birth as race, national origin, alienage, or illegitimacy, and, therefore, is deserving of consistent treatment.[23] To deny

[23] Even prior to this Court's decision in *Reed*, question was raised by Professor Cox and others as to the inconsistent treatment accorded different classifications under the Equal Protection Clause:

"In short, the decisions, as Professor Cox points out have failed to elaborate 'a rational standard, or even points of reference, by which to judge what differentiations are permitted and when equality is required.'[260] Why is a classification based on sex treated differently from one based on alienage?[261]". *Developments In The Law—Equal Protection*, 82 HARV. L. REV. 1065, 1123 (1969).

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sex suspect status would destroy the very rationale used by this Court in earlier years to legitimize original deviation from the traditional standard of review.

(b) The Mandatory Nature of the Rule Adversely Affects Respondents' Fundamental Right to Bear and Raise Children.

Since this Court decided the "grandfather of fundamental interest equal protection cases"[24] more than thirty years ago, it has been clear that the right to bear children is "one of the basic civil rights of man." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). In *Skinner* the Court exercised "strict scrutiny" in examining a statute requiring sterilization of certain types of habitual criminals.

The Court's decision in *Skinner* had been heralded by several earlier decisions recognizing the "right to marry, establish a home and bring up children" to be an essential part of the liberty guaranteed by the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Shortly thereafter, this Court also proclaimed the right of parents "to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925). In *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), it was pointed out that these

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260. Cox, *The Supreme Court, 1965 Term, Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 95 (1966) (footnote omitted).

261. *Compare Goesaert v. Cleary*, 335 U.S. 464 (1948), *with Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

[24] Gunther, *The Supreme Court—1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. R. 1, 28 (1972), describing *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

two earlier decisions had "respected the private realm of family life which the state cannot enter."

These and other fundamental constitutional guarantees in turn have created a "zone of privacy" for home and family life secure from intrusions of the state. *Griswold v. Connecticut*, 381 U.S. 479 (1965). Thus, in *Griswold*, since the state was unable to show that its statute prohibiting the use of contraceptives was "necessary . . . to the accomplishment of a permissible state policy," this Court invalidated the state law concerned. 381 U.S. at 497-498 (Justice Goldberg concurring).

In *Eisenstadt v. Baird*, 405 U.S. (1972), the fundamental nature of the right to privacy was held not restricted to the married. Striking down a Massachusetts statute that prohibited distribution of contraceptives to unmarried persons, this Court stated:

> "If the right of privacy means anything it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. at at 453.

In *Roe v. Wade* ___ U.S. ___, 93 S. Ct. 705, 726 (1973), the Court ruled that a state may not constitutionally prohibit all abortions. In doing so the Court traced the origins of the right of privacy to *Palko v. Connecticut*, and defined the right to include those "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)." In addition, the Court felt it clear that the right of privacy extends:

> ". . . to activities relating to marriage, *Loving v. Virginia*, 338 U.S. 1, 12 (1967), procreation, *Skinner v. Oklahoma*, contraception, *Eisenstadt v. Baird*, family relationships, *Prince v. Massachusetts*, and child

> rearing and education, *Pierce v. Society of Sisters*, and *Meyer v. Nebraska, supra.*
>
> This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent." *Roe v. Wade*, 93 S. Ct. at 726 (citations omitted).

The Court in *Roe* then reaffirmed its holding that the regulation of fundamental rights, "may be justified only by a 'compelling state interest' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake". 93 S. Ct. at 728 (citations omitted).

The strict scrutiny test is applicable not only where denial of a fundamental right is absolute, but also where state regulation penalizes its free exercise. Thus, in *Shapiro v. Thompson*, 394 U.S. 618, 634 (1968), statutory provisions were subjected to the compelling government interest test where eligibility to receive welfare benefits was restricted to state residents of at least one year. This Court found that, by establishing a waiting period, benefits were denied to otherwise eligible applicants solely because they had recently moved into the jurisdiction, 394 U.S. at 627. The Court in *Shapiro* held the challenged statutes unconstitutional due to the impact of the waiting period upon the "constitutional right to travel from one State to another. . . . |a|right that has been firmly established and repeatedly recognized," 394 U.S. at 630, quoting from *United States v. Guest*, 383 U.S. 745, 757-758 (1966). In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court subjected Tennessee's durational residence requirement for eligibility to vote to strict judicial scrutiny. Reaffirming the authority of its analysis in *Shapiro*, the court once again found an infringement of the right to travel. 405 U.S. at 338-339.

Respondents submit that the analogy of *LaFleur* to *Shapiro* is exact. The Cleveland Board of Education's mandatory maternity rule establishes a waiting period during which pregnant women are disqualified from work[25]. This minimum period of disqualification is eight months, longer by far than the time away from work recommended by any medical authorities known to Respondents for women whose pregnancies are normal.[26]

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[25] The California Supreme Court, in *Sail'er Inn, supra*, held that the statute involved infringed upon the plaintiff's fundamental right to work. *See also, Truax v. Raich*, 239 U.S. 33 (1915).

[26] Recent statements by medical authorities with respect to time away from work for childbirth include the following:

"It is estimated that nearly one-third (⅓) of all women of childbearing age in the United States are now in the labor force and even larger proportions of socio-economically less fortunate women are working. Although most studies have not found work in itself to be deleterious to the outcome of pregnancy, certain safeguards are recommended. Any occupation that subjects the pregnant woman to severe physical strain should be avoided. Ideally, no work or play should be continued to the extent that fatigue develops. Adequate periods of rest should be provided during the working day. Women with previous complications of pregnancy that are likely to be repetitive (for example, low birth weight infants) should minimize physical work." HELLMAN AND PRITCHARD, OBSTETRICS 340 (14th ed. 1971).

"It is desirable that the working woman see her physician during the first two or three months of pregnancy, both to verify the pregnancy and for a thorough initial examination. At this time, recommendation can be made regarding working during the remainder of pregnancy.

"If the patient continues in good health, feels well and the pregnancy proceeds normally, there is generally no reason why a normal working schedule cannot be continued until close to the expected date of delivery.

"The working woman, as all pregnant women, should maintain a good state of nutrition and get adequate rest and exercise. The patient and her employer should give consideration to these basic health needs in determining if a normal work schedule can be continued.

"Regular visits to the physician are an important part of good prenatal care and this should also be taken into con-

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The waiting period in *LaFleur* thus penalizes Respondents' fundamental right to bear children. Furthermore, under Petitioners' mandatory maternity rule there is no way in which a school teacher, whether through family planning or by chance, may escape this penalty.

If, as in the case at bar, employees anticipate childbirth during the middle of a summer academic vacation, they will be required to leave work the preceding spring. Since their babies will not have reached the age of three months by the time school starts again in September, they are prohibited from returning to work for at least another semester. Any re-employment early in the next calendar

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sideration. At these visits, the patient and her physician can determine how long she should continue to work.

"Following delivery, adequate time should be allowed for a complete recovery from the effects of childbirth before resuming a full work load. Six weeks is generally the time required for physiological changes to return to normal. But in individual instances a longer time may be required for this or for adjustments of feeding or to the problems of baby care. A post partem check-up is important for the physician can determine at this time if the patient is able to resume a normal work schedule."

Approved by the American College of Obstetrics and Gynecology, Executive Committee, February 13, 1972. 16 *American College of Obstetrics and Gynecology Newsletter* No. 4, at 4 (1972).

Another recent article discusses studies which disprove those studies cited in Petitioners' Appendix by Stewart and Douglas claiming to indicate that prematurity is more likely to result in those mothers who work. These later studies reveal that:

"There is no significant difference between mothers of premature infants and control infants in the proportions gainfully employed and in the proportion working during the last trimester. These findings provide additional support for the view based on available evidence that employment during pregnancy is probably not associated with prematurity. Doubt has been cast upon the studies of Douglas and Stewart by Ferguson and Logan." 103 AMERICAN JOURNAL OF OBSTETRICS AND GYNECOLOGY 358, 366, 368 (1969).

year will be permitted only if a vacancy occurs: the language of the maternity policy provides no more than a preferential re-employment right to an available vacancy; it gives no prior claim to the exact position earlier held.

Since there is no way Respondents can avoid the impact of the mandatory maternity regulation, the rule unavoidably penalizes their right to bear children, thereby impairing Petitioners' fundamental rights. Petitioners admit the penalty, but deny its importance, stating:

> "The only effect it has on pregnant school teachers is to deprive them of a few months' salary during a period of time when they are demonstrably not as able-bodied as they were before." (Pet. Br. 39).

Respondents deplore Petitioners' offhand deprecation of the effects of further economic sanctions on members of a class already severely disadvantaged.[27]

2. The Strict Standard Applied: There is No Compelling Need for the Present Regulation in the Furtherance of Legitimate Governmental Objectives.

Respondents urge this Court to exercise strict judicial scrutiny and hold that Petitioners have not met their burden of proof. Respondents are convinced that the record will persuade the reader that the present rule is both overly broad, unnecessary, and therefore void.

Indeed, there must be some doubt that Petitioners are serious when they argue that, tested by the strict

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[27] The impact of discrimination is seen most dramatically in the statistics depicting the economic profile of women who are heads of households, without a husband to help support their families. In March, 1972, twenty-two percent of all heads of households were women. "The median income of families headed by women was $5,144 in 1971. The comparable figure for families headed by men was $10,930." U. S. Dep't of Labor, Employment Standards Administration, Women's Bureau, *Facts About Women Heads of Households & Heads of Families* 2, 7 (1973).

standard of review, the mandatory maternity regulation must be upheld. In their discussion of strict scrutiny, Petitioners contend only that the evidence establishes:

> "... that a pregnant school teacher after the fourth month of pregnancy is not as able-bodied in the classroom as she was before pregnancy. She cannot perform the physical tasks which she is required to perform with the same degree of mobility and ease that she could when not pregnant." (Pet. Br. 39)

No allegation is made that the Respondents or pregnant school teachers, as a class, cannot perform their classroom duties. Nor do Petitioners contend that this particular regulation, as opposed to one without as broad a sweep, is necessary to the accomplishment of legitimate legislative objectives. In fact, as noted by the Respondents in their Statement of the Case, *supra*, Mr. Tanczos, Supervisor of Secondary Education, has testified that if a uniform period of notice was required of a pregnant teacher planning to take a maternity leave, the needs of the Cleveland Board of Education would be adequately met. Since no necessity has been shown and, additionally, a less restrictive alternative is available, Respondents submit that under the strict standard of review, Petitioners' mandatory leave policy must fail.

Restrictions on a teacher's right to return to work as soon as she is once again medically able to teach must also be invalid. Indeed, Petitioners at no time have attempted to justify this portion of the rule and do not seek to do so now. As Chief Judge Phillips said, concurring in *La Fleur* in this respect: "No evidence was introduced in the District Court and no reasons offered to this Court as to how this requirement is related rationally to any legitimate objective of the Board." 465 F.2d at 1190. Failure to suggest either a purpose or a need for restricting the return

to work must be proof sufficient that such a regulation is unconstitutional under the strict standard of review.

B. The Mandatory Maternity Rule is Arbitrary and Capricious and So Must also Fail Under the More Lenient Standard of Review

The Court of Appeals applied the test of *Reed v. Reed*, 404 U.S. 71, 76-77 (1971), overruling the District Court which, in ruling in favor of the Board of Education, applied the now outmoded Equal Protection test of *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911). The *Lindsley* Court stated: ". . . if any state of facts reasonably can be conceived that would sustain the [classification], the existence of that state of facts at the time the law was enacted must be assumed." The Court of Appeals followed instead the standard of review set forth in *Reed v. Reed*, which is applicable where strict judicial scrutiny does not apply. In *Reed*, the Court adopted the test of *F. S. Royster Guano Co. v. Virginia, supra*, and clearly ruled that states may not legislate different treatment to persons placed by statute in "different classes on the basis of criteria wholly unrelated to the objective of that statute." Instead, "some ground of difference having a fair and substantial relation to the object of the legislation" must be present. 404 U.S. at 75-76.

Cases subsequent to *Reed* have demonstrated that its standard of review is now one of general applicability. The test of equal protection cited with favor in *Reed* was adopted by this Court again in *Eisenstadt v. Baird*, 405 U.S. at 446-447. In *Frontiero*, three Justices electing not to exercise strict judicial scrutiny used the test of *Reed v. Reed* instead and found the classification equally invalid under its standard of review. 93 S. Ct. 1764, 1773 (Justice Powell concurring).

Lower courts and commentators alike have taken note that equal protection now requires actual inquiry into the relationship between legislative means and ends before a challenged classification can be upheld. *Green v. Waterford Bd. of Education*, 473 F.2d at 633 (2d Cir. 1973); *Aiello v. Hansen, supra*, slip opinion at 8; Gunther, *supra*, at 41-42. Applying the revitalized test of equal protection to the facts at hand requires judicial examination of not the professed, but the actual, objectives of Petitioners' mandatory maternity regulation and how substantial the relationship is between these objectives and their rule. Respondents believe that inquiry will here reveal, as it has to other courts rejecting similar rules, the arbitrary and capricious nature of the Board of Education's mandatory regulation. *Green, supra; Bravo, supra; Pocklington, supra; Monell, supra; Williams, supra.*

1. The Regulation Appears to Have No Medical Objectives; The Evidence Supports Only One Substantive Objective: Keeping Pregnant Teachers Out of Sight

The evidence as summarized in Respondents' Statement of the Case, *supra*, does not support a finding that Petitioners' objectives include any direct bearing on requirements of health, whether it be for the expectant mother or her child. Hypothesizing that such a purpose could be found, the evidence nevertheless fails to establish any relationship between the mandatory aspect of the maternity rule and the end of safeguarding maternal health, at least as to the vast majority of teachers whose pregnancies are normal.[28]

[28] Mandatory maternity regulations of some boards of education demonstrate their lack of medical foundation by making the periods away from work apply to adoptive, as well as natural mothers. *See, e.g., Heath v. Westerville Board of Education*, 345 F. Supp. at 503 (S. D. Ohio, 1972).

Since there was and is no medical reason for the adoption of the mandatory rule, Petitioners now claim its principal objective was to ensure classroom continuity. However, the evidence clearly demonstrates that in the present case the maternity rule was the cause rather than the cure of classroom discontinuity. That this is not infrequent is clear from other cases. *See* for example, *Seaman v. Spring Lake Independent School District, supra,* where preliminary relief was awarded to permit a pregnant teacher to continue teaching specifically to ensure continuity in her students' educational program. 5 EPD at 7268 (D.C. Minn. 1973).

The evidence presented in fact supports only one objective for the original adoption of the rule. The apparent purpose was simply that of keeping pregnant teachers out of sight. Since female teachers could legally be fired once they married, *Greco v. Roper*, 145 Ohio St. 243, 61 N.E. 2d 307 (1945)[29], adoption of a rule requiring them to stop working while pregnant was hardly controversial at the time it was adopted. Hearsay concerning children giggling at pregnant teachers was the only evidence offered for the rule from the Superintendent of Schools who recommended it. As the Court of Appeals for the Sixth Circuit first pointed out in *Abbot v. Mines,* 411 F.2d 353 (6th Cir. 1969), and reiterated again below: "Basic rights such as those involved in the employment relationship . . . cannot be made to yield to embarrassment." 465 F.2d at 1187. Other courts agree. The Second Circuit Court of Appeals considered the state interest of preventing classroom distractions caused by giggling children, "too trivial to men-

[29] State courts, of course, even in the 1940's, did not invariably uphold contract restrictions on a female teacher's right to marry. See for example, *Teggart v. School District, No. 52, Carroll County*, 88 S.W.2d 447. Note, however, reversal, 339 Miss. 223, 96 S.W. 335 (1936).

tion," stating that, "whatever may have been the reaction in Queen Victoria's time, pregnancy is no longer a dirty word." *Green v. Waterford Board of Education*, 473 F.2d at 635 (2d Cir. 1973). Furthermore, any purpose to keep pregnant teachers out of sight appears to be particularly absurd in the present case when, as noted earlier, Petitioners permit pregnant students to remain in their classes, *supra*, n. 3.

2. Irrebuttable Presumptions Embodied in the Maternity Rule Have Either Been Disproven or Are Irrelevant

The mandatory maternity rule of the Petitioners includes several irrebuttable presumptions which are invalid or irrelevant. The principal presumption is that pregnant women must be barred from jobs because they are disabled and can no longer perform their teaching functions. Since the rule includes this presumption, Petitioners strive in their brief to convince the reader that the presumption is correct without actually alleging it as proven fact. Indeed, *administrative necessity apart*, the Board of Education nowhere claims that pregnant women are physically disabled throughout any portion of their pregnancies or for any specified period of time thereafter. (*See, e.g.* Pet. Br. 24).

No evidence in this case supports such a presumption, and Petitioners, by pinning their case to such a guidepost, would be on a collision course with reality. Experts testifying agree: no restrictions on normal physical activity are required throughout pregnancy in the absence of complications. Medical opinion here mirrors common knowledge that:

> ". . . centuries of human experience attest to the reality that pregnant women work throughout their pregnancies, whether that work be performed in

fields, mills, factories, stores or offices, or in homes cleaning houses, cooking, and tending their husbands and other children." ***Struck v. Secretary of Defense,*** **460 F.2d 1372, 1379 (9th Cir., 1972) (Circuit Judge Duniway, dissenting).**

Recognizing the dilemma posed, the Board of Education has sought some way to draw a rational distinction between pregnancy and other medical disabilities in order to justify its special treatment of women anticipating childbirth. In so doing, Petitioners indicate another irrebuttable presumption on which their rule is based: namely, that all pregnancies *are or can be* "voluntary."

Petitioners state that the mandatory maternity rule, "deprives pregnant teachers of income . . . as a result of a physical condition which they have voluntarily assumed." (Pet. Br. 14) No federal appellate court to date, in considering the constitutionality of a mandatory maternity leave rule, has differentiated pregnancy from other temporary medical disabilities on the ground that it is voluntarily incurred. Indeed, Judge Haynesworth, writing the opinion of the court in *Cohen v. Chesterfield County School Board, supra,* sustaining the mandatory maternity regulation there challenged, admitted: "Of course, all pregnancies among teachers, as with other women, are not voluntary." 474 F.2d at 398, n. 8. The Tenth Circuit Court of Appeals in *Buckley v. Coyle Public School Systems, supra,* also noted that: "The fact, if it be a fact, that pregnancy is a voluntary status really has nothing to do with the question." 476 F.2d at 95.

No evidence in the record bears on this aspect of Petitioners' case, and true or false, Respondents dispute its relevance. Many temporary medical disabilities can result from voluntary actions. Doctors endlessly implore their patients to cut down smoking, drinking, or eating, and demand regular exercise instead. Man's failure to

heed such medical advice is never penalized by Petitioners with the severity reserved for pregnancy.

The Board of Education also argues that: "No female today, teacher or not, is required to become pregnant," citing to *Griswold*, *Eisenstadt*, and *Roe* (Pet. Br. 26). This argument appears intended to suggest that *Griswold*, *Eisenstadt*, and *Roe* established not rights but obligations. Has woman today having gained the right not to be pregnant against her will lost her former right to bear a child? No language of this court in *Griswold* or since has suggested the legitimacy of such a line of reasoning. Indeed, three Justices of the Court may have anticipated the issue now at bar eight years ago. In considering the test of equal protection to be applied in *Griswold*, Justice Goldberg, in a concurring opinion, stated:

> ". . . if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected." 381 U.S. at 497.

Respondents submit that the Board of Education's regulation demands precisely what these Justices feared: teachers must exercise compulsory and effective birth control in order to gain and retain a governmental job. If the right to bear children is accorded at least the same recognition as the right to terminate a pregnancy, Petitioners' mandatory maternity rule must be invalid. *See Buckley, supra*, 476 F.2d at 96, n. 3, citing to *Roe v. Wade, supra*.

3. Administrative Convenience Has Been Rejected By This Court as Legitimizing Otherwise Illegal Sex Discrimination

If the defenses raised to allegations of sex discrimination in recent years have had one thing in common, it is that the classifications challenged invariably have been argued to be required for administrative needs. This was a prime argument in *Reed v. Reed* where a state statute established a mandatory preference for males over females for appointment to positions of administrators of estates. In *Stanley v. Illinois, supra,* n. 18, it was again alleged that administrative needs dictated the presumption that a natural father was not as entitled to be considered legal parent to his children as would a natural mother. Finally, in *Frontiero v. Richardson,* the United States claimed an administrative need to deny dependency benefits to spouses of female officers on an equal basis with the wives of male officers.

In *Reed* the court had pointed out, although the classification was "not without some legitimacy," where the state has drawn a sharp line between the sexes solely for administrative convenience it has made an arbitrary legislative choice. 404 U.S. at 76, 77. In *Stanley* the result reached was the same, with the Court stating that, "the Constitution recognizes higher values than speed and efficiency." 405 U.S. at 656. The concurring three Justices in *Frontiero* who decided the merits of the case under the standard of review of *Reed,* appear to have taken the same view of the assertion of administrative necessity as did the four Justices invalidating the classification under the stricter standard of review. 93 S. Ct. at 1773 (Justice Powell concurring).

Respondents fail to see how Petitioners' claim of administrative necessity is any more valid here than it was in these three earlier cases. Rational treatment of the

maternal condition requires that, like other disabilities, it must be treated on an individual basis.[30] Pregnancy, by its very nature, can never be more than a temporary condition. Regardless of when disability begins, its termination is ensured, whether by birth, miscarriage, or abortion. Unlike many other medical conditions, however, the maximum period of disability due to pregnancy can be computed with some accuracy. This aspect of predictability should make it easier for employers to cope with pregnancy than with other temporary disabilities. Apart from their desire for some advance notice before a leave of absence is taken some time prior to childbirth, Petitioners' administrative plea is unconvincing. Respondents believe that such a notice requirement, if applicable generally to all employees anticipating time away from work for medical reasons, would satisfy Petitioners' need without doing violence to Respondents' equal protection guarantee. *Green v. Waterford Board of Education, supra,* 473 F.2d at 635.

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[30] That such treatment is perfectly possible within school systems is amply demonstrated by those maternity cases mooted after filing whether at the trial or appellate level. *Green, supra,* 473 F.2d at 636; *Guelich v. Mounds,* 334 F. Supp. 1276 (D. Minn. 1972). *See also, Struck, supra,* vacated for determination of mootness, 93 S. Ct. 676 (1972).

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals for the Sixth Circuit should be affirmed and the Cleveland Board of Education's mandatory maternity rule should be declared unconstitutional.

Respectfully submitted,

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